FILE COPY

Supreme Court, U.S.
FILED
MAY 24 197
MICHAEL RODAK, JR.,

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-1310

SAM DEAN,

PETITIONER

VS.

THE GADSDEN TIMES PUBLISHING CORPORATION, a corporation,

RESPONDENT

## REPLY TO BRIEF OF RESPONDENT IN OPPOSITION

THOMAS E. DAVIS
BURNS, CARR & SHUMAKER
821 Chestnut Street
Gadsden, Alabama 35901
(205) 547-6791

COUNSEL FOR PETITIONER

MORIN, DICKSTEIN, SHAPIRO & GALLIGAN
800 Federal Bar Building West
Washington, D. C. 20006

OF COUNSEL

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-1310

SAM DEAN,

PETITIONER

VS.

THE GADSDEN TIMES PUBLISHING CORPORATION, a corporation,

RESPONDENT

## REPLY TO BRIEF OF RESPONDENT IN OPPOSITION

Petitioner respectfully submits this brief in reply to the brief of the respondent in opposition to a petition for writ of certiorari to the Court of Civil Appeals of Alabama.

The respondent raised certain matters in his brief in opposition which should be clarified by petitioner. In petitioner's application for an extension of time within which to file a petition for writ of certiorari, petitioner asserted that the Supreme Court of Alabama denied an application for rehearing on November 30, 1972. Respondent raises the point that the application was denied on November 29, 1972, and attaches a copy of a notification from the Clerk of the Supreme

Court of Alabama dated November 29, 1972, that shows such action was taken on that day. However, Title 28, Section 2101(c), United States Code Annotated, provides that the time for filing is computed from the date of the actual entry of the judgment. Action by the Alabama Supreme Court may have been taken on November 29, but the judgment or decree was not entered until November 30. The date of the denial of the rehearing was indicated in the opinion as November 30. The Clerk of the Supreme Court of Alabama advised the attorneys for petitioner that the judgment of denial was entered on November 30.

The entry of the denial of the rehearing was made on November 30, 1972, and the extension of time was timely granted by this court. Were there any error, it was not in any way intended to mislead the Court in seeking an extension of time.

Furthermore, the application was filed within ninety days from either date, and the order of Mr. Justice Powell was entered within that time. The reasoning of the respondent, that the application should have been filed by February 17, 1973, is totally outside the realm of reason.

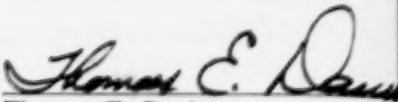
Respondent raises the point in his brief that the statute is defective because the application presents some inequities among respective employers and that all employers are not treated equally. This court has said, on numerous occasions, that inequality of application does not in and of itself render a statute unconstitutional, as long as the state has a legitimate interest in the matter at hand. Because there can be no mathematical certainty in enacting a statute, the state is not required to sit back and pass no legislation if the problem can be alleviated by appropriate legislation.

Respondent insists that this court follow the dissent of Mr. Jackson in *Day-Brite Lighting v. Missouri*, 342 U. S. 421, 72 Supreme Court 405. He cites the cases of *Illinois Central Railroad Company v. Commonwealth*, 305 Kentucky 632, 204 Northwestern 2d 973, *Heimgaertner v. Benjamin Electric Manufacturing Company*, 6 Illinois 2d 152, 128 Northeastern 2d 691. This court declined to review the case of *Illinois Central Railroad Company v. Commonwealth*, supra. The denial by this court of certiorari was certainly not an adoption or ratification of the lower court's holding. Those cases represent a minority view of two states, and do not reflect this court's philosophy. The opinion in *Day-Brite Lighting v. Missouri*, supra, shows that those cases cited by respondent were considered by the court in its opinion and that it recognized them as being contrary. Those cases were considered by this court in the Day-Brite case and were rightfully rejected as being not representative of this court's philosophy. The position urged by respondent reflects a position urged upon this court over twenty years ago. It was rejected then and should be rejected now, for recent decisions indicate that, if this court's viewpoint has changed at all, it has drifted further away from the position of the respondent. The modern trend clearly indicates a reluctance by this court to oversee and review actions by state legislatures.

## CONCLUSION

For the reasons heretofore argued by petitioner, and for the ones set forth above, it is strongly urged that this court should not only review the decision below, but should grant a summary judgment, reversing the decision of the court below and remanding it with instructions consistent with this court's holdings.

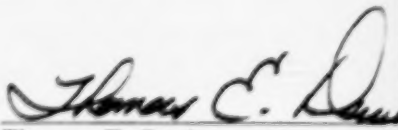
Respectfully submitted,



Thomas E. Davis
Burns, Carr & Shumaker
821 Chestnut Street
Gadsden, Alabama 35901
(205) 547-6791
ATTORNEYS FOR PETITIONER

## PROOF OF SERVICE

I, Thomas E. Davis, of the law firm of Burns, Carr & Shumaker, attorneys of record for Sam Dean, petitioner herein, depose and say that on the 22 day of May, 1973, I served a copy of the foregoing Reply to Brief of Respondent in Opposition on the Honorable Curtis Wright, of the law firm of Dortch, Wright & Ford, attorneys of record for the respondent herein.



Thomas E. Davis